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IN THE SUPREME COURT OF ~~THE~~ STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent

-v-

Case No.

JOHN EARL McMILLAN,

Case No. 15654

Defendant-Appellant.

BRIEF OF APPELLANT

An appeal from convictions of Forcible Sodomy and Forcible Sexual Abuse rendered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
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Plaintiff-Respondent, :
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 :
JOHN EARL McMILLAN, : Case No. 15654
 :
Defendant-Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant, JOHN EARL McMILLAN, appeals from convictions of Forcible Sodomy and Forcible Sexual Abuse rendered in the Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The matter was tried before the Honorable Peter F. Leary without a jury and the appellant was found guilty of the crime of Forcible Sodomy, a Felony of the First Degree and the crime of Forcible Sexual Abuse, a Felony of the Third Degree.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of convictions of Forcible Sodomy and Forcible Sexual Abuse and dismissal of those charges against him, or in the alternative, a new trial on those charges.

STATEMENT OF THE FACTS

Among other witnesses, Marlene Harpole testified that on July 5, 1977, she saw her daughter, Becky (age 4), her son, Kirk (age 3) and two other children, Bryson (age 4) and Anson Jack (age 3) by a house being built near her home (T. 39-40). Mrs. Harpole testified that she saw a man by the side of the house and it looked as if he and the children were talking. Mrs. Harpole was about two hundred feet from the man and could not make out his facial features (T. 40-41). About fifteen minutes later, Mrs. Harpole went over to the house being built to get her children. Mrs. Harpole testified that one of the children, Anson, told her, "that man showed us his weenie. He let us feel it, and we tasted it and it tasted yukky" (T. 43). Mrs. Harpole then went to the home of Mrs. Laurie Jane Jack (the mother of Anson and Bryson) and told her what had happened. Mrs. Harpole then went home and got a piece of paper and a pencil and with Mrs. Jack and the children went back over to the house that was being built, where she wrote down the license plate number of a red truck she had seen at the house earlier (T. 43-45). Mrs. Harpole testified that she saw two people standing around the truck, one of them being the man she had seen before (T. 45).

Laurie Jane Jack testified that on July 5, 1977, at about 1:30 p.m. Marlene Harpole came to her house and told her that the children had an encounter with a man over at the house. Mrs. Jack

then called the children in and discussed the incident with them (T. 53-54). Mrs. Jack then went over to the house under construction with Mrs. Harpole and the children. Mrs. Jack testified that Bryson told her which man it was (T. 55-56). Mrs. Jack identified the appellant as the man Bryson pointed out to her (T. 56). Mrs. Jack then called Russell Sanderson, a Salt Lake County Sheriff who lived in her neighborhood, and reported the incident to him.

Russell Sanderson testified that Mrs. Jack gave him a physical description of a suspect, a vehicle description and a license plate number (T. 67). The following day, July 6, 1977, Sheriff Sanderson went to the house under construction where he found the appellant and arrested him (T. 72).

ARGUMENT

POINT I

THE TESTIMONY OF MARLENE HARPOLE AND LAURIE JANE JACK WAS HEARSAY EVIDENCE AND THEREFORE INADMISSIBLE AND ITS ADMISSION WAS A VIOLATION OF APPELLANT'S RIGHT TO CONFRONT HIS ACCUSERS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTION 12 OF THE UTAH CONSTITUTION.

The trial court allowed the witness, Marlene Harpole, to testify as to what the children told her about the alleged incident (T. 43). The trial court also allowed the testimony of Laurie Jane Jack as to what the children told her (T. 54) over the objections of defense counsel. Clearly, this testimony was hearsay. Hearsay is

testimony offered to prove facts of which the witness has no personal knowledge, but which have been told to him by others. The witness is not testifying from his own knowledge or observation but is acting as a conduit to relay that of others. State v. Sibert, 6 Utah 2d 198, 310 P.2d 388.

Although some courts discussed the matter under the terminology *res gestae*, courts today recognize an exception to the hearsay rule for certain statements made under the influence of a startling event. The two basic requirements of this exception to the hearsay rule are discussed by Professor McCormick:

First, there must be some occurrence of event sufficiently startling to render normal reflective thought processes of an observer inoperative. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. McCormick's Handbook of the Law of Evidence, §297.

In Cromeenes v. San Pedro, Los Angeles and Salt Lake Railroad Company, 37 Utah 475, 109 P.10 (1910) this Court discussed this exception to the hearsay rule:

To bring the declarations of a party within the doctrine of *res gestae*, they must be connected with, and grow out of, the act or transaction which is the subject matter of the inquiry so as to form one continuous transaction, and must, in some way, elucidate, qualify, or characterize the act, and on a legal sense, be a part of it. . . . the test of whether or not declarations are *res gestae* is: Where the facts talking through the party, or the party's talk about the facts? Instinctiveness is the requisite, and when this exists the declarations are admissible. 37 Utah 490.

The basis for the admission of the declaration is its spontaneity .

The excitement suspends the declarant's powers of reflection and fabrication which leads to the view that the declaration is reliable.

This exception to the hearsay rule is recognized in Rule 63 of the Utah Rules of Evidence which provides:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

. . . (4) a statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception . . .

The hearsay statements of Marlene Harpole and Laurie Jane Jack which the trial court allowed were not made while the declarants, the children, Anson and Bryson, were perceiving the event. The statements made by the children to Mrs. Harpole were made ten to fifteen minutes after the alleged incident. Nor was there any indication that the children were under the stress of a nervous excitement caused by such perception to allow the hearsay evidence to come in under this exception. In fact, Mrs. Jack had to call the children in from play and at that point elicited the statements from them (T. 53).

In State v. Sanders, 27 Utah 2d 354, 495 P.2d 270 (1972) this Court affirmed the trial court's ruling that a statement was inadmissible as a spontaneous explanation where the conditions of stress of a nervous excitement caused by such perception were absent. 496 P.2d at 274.

In Langford v. State, 312 So.2d 65 (Alabama 1975), the Court considered a case quite similar to the one at hand. The defendant was convicted of abusing a girl under the age of twelve years, in the attempt to have carnal knowledge of her. The trial court allowed the mother of the alleged victim to testify what the child told the mother soon after the mother first saw her after the alleged occurrence. The Court ruled that the admission of the mother's testimony was improper as it did not come under the spontaneous exclamation exception:

Little fault can be found in an assumption that the child was excited at the time of her statements to her mother, apparently twenty or thirty minutes after the alleged crime, but such assumption could be based solely upon a concept of usual natural reactions to such an offense. There was no effort by the State to show her excitement, which could have been easily shown, if there was any. We are unwilling to state that the natural and normal disposition of such victims under any and all circumstances, including as in this case injury, while being examined promptly thereafter by a physician, is always sufficient to show an extension for any substantial measured length of time of excitement or instinctiveness in a particular individual as distinguished from deliberation. This case, as bad as it is, does not fall within any special category of rape or sexual abuse of children that relieves the State of the duty of showing by some evidence, if it can, special circumstances that warrant the application of a special rule of inclusion, which is an exception to a general rule of exclusion.

Our conclusion that the statements of the girl do not meet the test of spontaneity does not offend any principle that such decision should be largely left to the discretion of the trial judge. On the other hand, it finds support in the fact that apparently neither the State nor the trial court took the position that the evidence

was admissible as constituting a part of the res gestae or a spontaneous exclamation. The trial judge stated, "If it goes to a complaint about the incident it is admissible. If it goes to something else I will sustain it. I will just have to hear it, and exclude it if it is not proper.

The hearsay rule, which has long been recognized and respected by virtually every state, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the trier of fact. Chambers v. Mississippi, 410 U.S. 298, 35 L. Ed. 2d 310, 311.

The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right, essential to a fair trial, and is made obligatory on the states by the Fourteenth Amendment. A major reason underlying the Constitutional Confrontation Rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him. Pointer v. Texas, 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965).

Appellant was denied his constitutional right to cross-examine the witnesses against him when the court admitted the hearsay testimony of Marlene Harpole and Laurie Jane Jack. Mrs. Harpole testified as to what Anson Jack told her of the incident (T. 43).

The declarant, Anson, was not a witness, and could therefore not be cross-examined as to his statement.

The only identification of appellant was by the witness, Laurie Jane Jack and was a hearsay identification. Laurie Jane Jack testified that the day of the incident she asked Bryson Jack which man had committed the offense, and Bryson pointed out appellant (T. 55-56). At the trial, Bryson could not identify the appellant:

Q. [MR. MARSON] Now, did your mom ask you about the man?

A. [BRYSON JACK] Yes, she said, "Is that the man?" I said, "Yes."

MR. JOHNSTON: Objection to that and request it to be stricken, Your Honor.

THE COURT: Well -

MR. JOHNSTON: What was said is hearsay.

THE COURT: I think you ought to lay a foundation as to identification, please.

MR. MARSON: Your Honor, this witness cannot identify the defendant.

THE COURT: Go ahead. (T. 31)

Since the statements of Marlene Harpole and Laurie Jane Jack concerning what the children told them about the alleged incident and the identification of appellant by Laurie Jane Jack were hearsay statements and the statements do not meet the conditions which would allow them to come in under the exception to the Hearsay Rule 63(4)(b), the statements were inadmissible as evidence. The admission of the hearsay statements was unconstitutional as it denied appellant

the right to cross-examine the witnesses against him.

POINT II

THE TRIAL COURT ERRED IN RULING THAT THE WITNESS, BRYSON JACK WAS COMPETENT TO TESTIFY.

Utah Code Ann. §78-24-2 (1953 as amended) provides:

The following persons cannot be witnesses:
... (2) children under ten years of age, who
appear incapable of receiving just impressions
of the facts respecting which they are examined,
or of relating them truly.

In regard to testamentary capacity, it is admitted that a child of
any age can testify if they meet certain qualifications. In State
v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965) the Court discussed
those qualifications:

What is essential is that it appears that the child
has sufficient intelligence and maturity that she is
able to understand the questions put to her; that
she has some knowledge of the subject under inquiry
and the facts involved therein; that she is able
to remember what happened; and that she has a sense
of moral duty to tell the truth.

Appellant submits that the witness, Bryson Jack, was not adequately
qualified as a witness and was not competent to testify. Bryson Jack's
incompetence as a witness appears from consideration of the whole of
his testimony.

On cross-examination, the witness, Bryson Jack, contra-
dicted the testimony he gave on direct examination saying what he
told the Court was not true:

Q. Bryson, you've told the Judge that you tasted
somebody's weenie.

A. I know.

Q. Now, that isn't true; is it, Bryson?

A. Uh-uh.

Q. It isn't true; is it?

A. Uh-uh; not true.

Q. It isn't true; is it, son?

A. Uh-uh.

Q. I have nothing further. (T. 35)

And again, on recross-examination:

BY MR. JOHNSTON:

Q. Bryson --

A. What?

Q. --it's true, isn't it, that you didn't taste the man's weenie?

MR. MARSON: Your Honor, could I ask Mr. Johnston to rephrase that question? I understand this is cross-examination, but conceptually we're dealing with a difficult type of question; "It's true, isn't it." If we could be rather straightforward with this child I think it would be helpful.

THE COURT: The objection is overruled.

Q. (By Mr. Johnston) That's true, isn't it?

A. Uh-uh.

MR. MARSON: Your Honor, I'd like to object again.

THE COURT: The objection as to the form of the question will be sustained.

MR. MARSON: Thank you, Your Honor. Wait a minute, Bryson.

Q. (By Mr. Johnston) Bryson --

A. What?

Q. --Becky didn't taste the weenie; did she?

A. Uh-uh.

Q. She didn't, now; did she, Bryson?

A. No.

MR. MARSON: Your Honor, again, I wish he could be straightforward. I don't think the child understands the two double negatives. He's saying yes to the fact that she did.

THE COURT: Rephrase the question, please.

Q. (By Mr. Johnston) Bryson--

A. What?

Q. --Becky didn't taste the weenie; did she?

A. No. (T. 37-38).

Nor did Bryson appear capable of understanding some of the questions put to him by counsel:

Q. (By Mr. Johnston) Bryson, do you go to church?

A. Yes.

Q. What church do you go to?

A. Go down to the church.

Q. Okay. Are you a member of a religion?

A. Yes.

Q. What religion are you a member of?

A. My teacher.

Q. Your teacher?

A. Yes.

Q. Do you know what religion you're a member of?

A. No.

Q. How often do you go to church, son?

A. Just every day.

Q. Every day?

A. After school.

Q. Every day after school?

A. Yes. (T. 34-35)

Or by the Court:

THE COURT: Now, in addition to your mom talking to you about telling the truth, has anybody else talked to you about telling the truth?

BRYSON JACK: Yes.

THE COURT: And who might that be?

BRYSON JACK: My mom. (T. 19-20).

Appellant submits that the contradictory testimony of the witness and his inability to understand questions put to him renders the witness, Bryson Jack, incompetent to testify.

CONCLUSION

Appellant respectfully submits that the admission of the hearsay evidence and the ruling that Bryson Jack was competent to testify was error and should result in a dismissal of the charges

against him or in the alternative, a new trial on those charges.

Respectfully submitted,

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